discussion where a first mortgagee accepts a new mortgage which although not defective is subsequent in time to another incumbrance.[12] The result should be the same where the new mortgagee is a third party who furnished money to remove the first mortgage.[13]

Equitable substitution is invoked in these cases[14] simply as an appropriate means of preventing unjust enrichment. It has no technical requirements.[15] It is believed that the judgment creditor in both cases under discussion was unjustly enriched. As a matter of substance the transaction was a substitution of the new mortgage in the place of the old mortgage, and the mere form of the transaction should not be the basis of equitable priority. The security of the judgment creditor should not be advanced at the expense of the mortgagee. It is not enough to justify equitable substitution that the judgment creditor would be left in no worse position, but it is submitted that the doctrine should be applied to prevent the judgment creditor from enjoying an inequitable advantage. If the mortgagee paid the judgment creditor money under a mistake, it would be unconscionable for the judgment creditor to insist upon his legal title to the money. The unjust enrichment in the present case, although not so palpable is none the less real. The argument that the new mortgagee was negligent in not looking up the record of the judgment[16] and that the judgment creditor had an equal equity confuses the doctrine of purchaser for value without notice with the doctrine of equitable substitution for the prevention of unjust enrichment.

ASSUMPTION OF RISK AS A DEFENSE WHERE THE NEGLIGENCE IS A BREACH OF A STATUTORY DUTY. — The doctrine of assumption of risk, although most often arising in cases between master and servant, is not confined to such cases, nor to those where the parties are in contractual relation to each other.[1] But in many situations where one person would ordinarily have a duty to abstain from or prevent an injury to another, this duty may be removed if the person to whom the duty is owed voluntarily and appreciating all the facts subjects himself to the danger.[2]

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[12] Bruse *v.* Nelson, 35 Ia. 157; Campbell *v.* Trotter, 100 Ill. 281; Geib *v.* Reynolds, 35 Minn. 331; Wooster *v.* Cavender, 54 Ark. 153, 15 S. W. 192.

[13] Tyrrell *v.* Ward, 102 Ill. 29, 16 HARV. L. REV. 525. *Cf.* Tradesmen's Building, etc. Association *v.* Thompson, *supra*; Home Savings Bank *v.* Bierstadt, *supra*; Bruse *v.* Nelson, *supra*. *Contra*, Fort Dodge Building and Loan Association *v.* Scott, 86 Ia. 431, 53 N. W. 283; Mather *v.* Jenswold, 72 Ia. 550, 32 N. W. 512, 34 N. W. 327. *Cf.* Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374. See Holt *v.* Baker, 58 N. H. 276, for a case where an intervening incumbrancer relied upon the discharge of the first mortgage.

[14] For other cases see 1 JONES, MORTGAGES, §§ 874–885.

[15] See Merchants' and Miners' Transportation Co. *v.* Robinson-Baxter-Dissosway Towing and Transportation Co., 191 Fed. 769, 772.

[16] Fort Dodge Building and Loan Association *v.* Scott, *supra*; Mather *v.* Jenswold, *supra*.

[1] Ilott *v.* Wilkes, 3 B. & Ald. 304; Rase *v.* Minneapolis, St. P. & S. S. M. R. Co., 107 Minn. 260, 120 N. W. 360.

[2] Such intelligent choice of a dangerous situation, whereby the performance of a duty of protection is waived is entirely distinct from contributory negligence, which does not remove the duty but merely affords a defense. See Thomas *v.* Quartermaine, 18 Q. B. D. 685, 697, 702.

When a statute renders an employer liable criminally if he fails to provide safe appliances for his employees, it is considered to impose also an absolute tort duty to the employees, so that a failure to act is negligence *per se*.[3] By the weight of authority, this duty cannot be waived.[4] In a recent case a statute made criminal the failure of a factory owner to guard machinery. The plaintiff was injured by such failure under circumstances in which at common law he would have assumed the risk. The court held that a servant could not assume the risk of the master's failure to perform this statutory duty. *Fitzwater* v. *Warren*, 206 N. Y. 355. Most of the courts maintaining this view reach the result on the theory that assumption of risk is based upon contract, and that an express or implied contract not to sue the master for an injury resulting from a violation of the statute is illegal and void.[5] It is considered that the purpose of the statute will not be adequately accomplished by its enforcement through the criminal penalty alone.[6]

The theory of illegal contract, while sound so far as it goes, is too limited in its application, because it cannot apply to cases of assumption of risk where the relations are not contractual.[7] The principle of the doctrine of assumption of risk, expressed in the maxim *volenti non fit injuria*, was recognized even before that of contracts.[8] It would seem to be an axiomatic rule of justice that a man should not be permitted to act voluntarily to his own detriment and then to put the burden of his folly upon another. Now if the right of the individual to recover involves only his personal interest he may consent to give it up. But if society has an interest in the right then the consent of the individual cannot destroy the right.[9] Thus a householder cannot waive his exemption because of the social interest that he and his family be not reduced to poverty.[10] An insurance company cannot waive a lack of insurable interest because of the danger to society in tempting the beneficiary to destroy the life or chattel in which he has no interest.[11] The importance which the doctrine of assumption of risk acquired in the nineteenth century is an example of the individualistic theory of justice on which the common law of that period proceeded, allowing each man to work out his own salvation. But statutes prescribing criminal liability for failing to guard machinery are enacted to protect the interest which society has that its members be not maimed.[12] The principal case, in

[3] Green *v.* American Car & Foundry Co., 163 Ind. 135, 71 N. E. 268; McGinty *v.* Waterman, 93 Minn. 242, 101 N. W. 300.

[4] Narramore *v.* Cleveland, C., C. & St. L. Ry., 96 Fed. 298; Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371; Murphy *v.* Grand Rapids Veneer Co., 142 Mich. 677, 106 N. W. 211; Baddeley *v.* Earl Granville, 19 Q. B. D. 423.

[5] The leading case in this country maintaining this theory is Narramore *v.* Cleveland, C., C. & St. L. Ry., *supra*; and its reasoning has been generally followed.

[6] But *cf.* Osterholm *v.* Boston, etc. Mining Co., 40 Mont. 508, 107 Pac. 499.

[7] *Cf.* Ilott *v.* Wilkes, *supra*; See Osterholm *v.* Boston, etc. Mining Co., 40 Mont. 508, 525, 107 Pac. 499, 504.

[8] A recognition of the principle is found even in the writings of Homer (ILIAD, 4, 43), and of Aristotle (EUDEMEAN ETHICS, Bk. V, c. xi).

[9] This idea has been incorporated in some statutes. See GA., CODE, 1911, § 10.

[10] Moxley *v.* Ragan, 10 Bush (Ky.) 156.

[11] Saddlers Co. *v.* Badcock, 2 Atk. 554.

[12] See Monteith *v.* Kokomo Wood Enameling Co., 159 Ind. 149, 154, 64 N. E. 610,

overruling an earlier New York decision [13] construing the same statute, illustrates the increasing inclination of the courts to-day to recognize this interest of society.[14] The employee's consent by an assumption of the risk to give up a right involving such an interest should not be effective whether such consent be worked out contractually or otherwise.

RECENT CASES.

ADMIRALTY — TORTS — DAMAGES RECOVERABLE FROM ONE OF TWO VESSELS AT FAULT. — A steamship collided with a barge which was being towed by a tug. The steamship and tug were both at fault. The owners of the barge sued the steamship and recovered full damages. *Held*, that the judgment should be affirmed. *The Devonshire*, 107 L. T. R. 179 (H. L.).

For a discussion of the decision of the lower court, see 25 HARV. L. REV. 183.

AGENCY — RATIFICATION OF UNAUTHORIZED CONTRACTS — CONTRACT OF INSURANCE RATIFIED AFTER OCCURRENCE OF LOSS. — A contract of insurance was made on behalf of the plaintiff without authorization, but the premium was not paid. *Held*, that the plaintiff may ratify the contract after he knows of loss. *Marqusee* v. *Hartford Fire Ins. Co.*, 198 Fed. 475 (C. C. A., Second Circ.).

This decision reverses a holding which followed *Kline Bros.* v. *Royal Ins. Co.*, 192 Fed. 378, previously decided in the lower court. For a criticism of that case, see 25 HARV. L. REV. 729.

BANKRUPTCY — PROVABLE CLAIMS — CLAIM AGAINST BANKRUPT INDORSER OF NOTE MATURING AFTER THE FILING OF THE PETITION: EFFECT OF PARTIAL PAYMENT AT MATURITY BY MAKER. — The indorser of certain promissory notes became insolvent, and a petition in bankruptcy was filed before the maturity of the notes. At maturity part payment was made on the notes by the maker. *Held*, that the holder may prove for the entire amount of the notes. *In re Simon*, 197 Fed. 105 (Dist. Ct., W. D. N. Y.).

Under the Bankruptcy Act of 1898 there is no express provision for the discharge of contingent liabilities. By the earlier decisions under this act it was held that claims founded on such liabilities could not be proved. *Goding* v. *Roscenthal*, 180 Mass. 43, 61 N. E. 222. *In the matter of McCauley*, 2 N. B. N. Rep. 1085. And it is well settled that when a claim is so uncertain because of a contingency as to make any calculation of its value practically impossible, such claim is not provable. *Dunbar* v. *Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757. Although the liability of an indorser is not determinable before maturity, it has been held by a liberal construction of § 63 *a* (4) of the act, which provides for proof of a claim founded upon a contract express or implied, that claims against a bankrupt indorser may be proved when the notes mature after the filing of the petition but before the expiration of the time for proving claims. *Moch* v. *Market Street National Bank*, 107 Fed. 897; *In re Semmer Glass Co.*, 135

611; Lore *v.* American Manufacturing Co., 160 Mo. 608, 621, 61 S. W. 678, 682. See also 20 HARV. L. REV. 111.

[13] Knisley *v.* Pratt, 148 N. Y. 372, 42 N. E. 986.

[14] An exposition of the way in which judicial reasoning will be affected by the changes of general opinion will be found in Smart *v.* Smart, [1892] A. C. 425, 432. This attitude on the part of the courts shows a capacity in the common law to adjust itself to changing conditions.